National Association of NAB BROADCASTERS®

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April 6, 2007

Ex Parte Communication

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20445

Re: MB Docket No. 07-57

Dear Ms. Dortch:

On April 5, 2007, Joel Oxley, Senior Vice President, Bonneville International, Jane Mago and the undersigned of the National Association of Broadcasters ("NAB") met with Commissioner Michael Copps and Rick Chessen and Bruce Gottlieb of Commissioner Copps' office, and Commissioner Robert McDowell and Angela Giancarlo and Cristina Pauze of Commissioner McDowell's office, to discuss the above-captioned consolidated transfer applications of XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc.

We expressed our concerns that the proposed merger-to-monopoly will harm consumers, undermine fair competition in local radio markets, and violate the Commission's long-standing prohibition against a merger of the nation's only two satellite radio licensees. We also cautioned against the creation of a regulated satellite radio monopoly subject to conditions, given the applicants' records of violations of the Commission's rules.

The attached documents were distributed at these meetings. Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Larry A. Walke

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Attachments

The Sirius/XM Merger Should Be Rejected

The Proposed Merger is Anti-Consumer

- ✓ Only Sirius and XM provide a national, multi-channel mobile audio service. No one else, including terrestrial radio, offers a competitive substitute.
- ✓ The relevant market for merger review is SDARS, as defined by the FCC just last month (Satellite Competition Report, Mar. 26, 2007).
- ✓ Allowing Sirius and XM to merge will create a monopoly in the SDARS market, with control over the entire 25 MHz devoted to SDARS.
- ✓ A Sirius/XM monopoly will lead to higher prices, reduced consumer choice and program diversity, and diminished innovation.
- ✓ Sirius and XM could (1) reduce prices, (2) unbundle their channel packages, (3) block and refund adult channels, and (4) unlock exclusive deals with content providers, right now if they wanted. None of the alleged merger benefits are merger-specific.

The Proposed Merger is Anti-Competitive

- ✓ Radio stations do not compete in the *national* mobile market occupied by Sirius and XM, but Sirius and XM do compete for listeners in *local* radio markets.
- ✓ Sirius/XM could cross-subsidize low-cost a la carte offerings and predatory advertising rates with monopoly rents for its national mobile audio services.
- ✓ Sirius/XM could lock up exclusive contracts for sports and other attractive programming, like cable TV.
- ✓ Program producers will suffer as Sirius and XM will no longer have to compete with each other for unique content.

The Proposed Merger Violates FCC and Congressional Policy & Antitrust Law

- ✓ The FCC specifically barred the merger of the two SDARS providers to ensure "intra-market" competition for the benefit of consumers (1997 SDARS Order).
- ✓ A merger would contradict the 1996 Telecom Act policy favoring competition over regulation. Why would the FCC want to create a regulated monopoly?
- ✓ This is worse than EchoStar/DirecTV, which the FCC considered a merger of three competitors into two. Sirius/XM would be a merger to monopoly.

Sirius/XM's Proposed Merger Conditions are Red Herrings

- ✓ Price caps would be temporary, unlike Sirius/XM's monopoly power, which inevitably will lead to future price increases once the caps expire.
- ✓ If past performance is any indicator, Sirius and XM cannot be expected to comply with more regulatory obligations, *e.g.,* still no consumer-friendly dual receiver.

National Association of
NAB
BROADCASTERS®

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March 22, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Chairman:

On March 20, Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") filed applications for authority to transfer control of their FCC authorizations in connection with their plan of merger announced on February 19, 2007. Local radio broadcasters oppose this proposed merger because it violates the antitrust laws and established FCC rules and policies requiring that such transactions serve the public interest, convenience and necessity. If approved, the merger will create a government-sanctioned satellite radio monopoly. The merged entity will control all of the spectrum now allocated for satellite radio in the United States and coordinated internationally for such use, thereby barring any meaningful competitive entry within the foreseeable future. This merger to monopoly in satellite radio will create an opportunity for widespread abuse of monopoly power to the detriment of consumers, audio content providers, national and regional radio networks, and free over-the-air local radio stations.

As foreseen by the Commission, competition between two satellite radio providers has served consumers well. Each provider has differentiated itself with unique programming and equipment offerings. The loss of competition will halt further innovations in satellite radio service and technology to the detriment of the public.

Sirius and XM tout certain "merger-specific public interest benefits." Without exception, however, all of the alleged benefits would be more likely to occur without the merger in an environment of continued competition. Creation of a satellite radio monopoly is certainly not necessary to realize such benefits.

For example, both of the merger parties are free today to unbundle their channel offerings for subscribers at any time. Unbundling is not a merger-specific benefit. Similarly, the offer of a smaller programming package for less than $12.95 per month is also possible today without a merger.

Moreover, the repackaging of channels from both services into one offering is an illusory consumer benefit because it will result in the elimination of existing channels or formats. The loss of competition in satellite radio ultimately will reduce consumer choice. Such changes and reductions in overall program availability are not merger-specific benefits, and, in the long run, will decrease program diversity.

The hollow promise by Sirius and XM of reduced prices for less overall satellite radio programming is simply not a consumer benefit. Any price concessions offered by the merger parties will clearly be temporary in nature, unlike their monopoly power, which inevitably will lead to price *increases* in the future. As recognized in the 1996 Telecommunications Act and countless Commission decisions, continued competition between two providers is the strongest possible constraint on prices. Moreover, as NAB has previously noted, the fact that XM and Sirius have a long track record of failing to follow FCC requirements casts grave doubts on whether the government could rely on any such promise.

Indeed, one must question whether there is any credible justification for this merger. Sirius and XM claim that changes in the mobile audio marketplace since 1997, when the Commission unanimously rejected a satellite radio monopoly, *alone* justify the wholesale reversal of the Commission's rules requiring competition in satellite radio. However, this is just not so, even under the novel and incorrect definition of the relevant market they propose for purposes of merger review, which is intended to obscure the resulting monopoly in satellite radio. It is simply wrong to equate Internet radio, local AM, FM, and HD radio, MP3 devices, and iPods with satellite radio. While some of these devices may provide one or two parallel features, none resembles XM or Sirius in terms of programming breadth, price, reach and delivery mode. No other audio service is an effective substitute for a national multichannel mobile audio programming service. They cannot be expected to restrain the monopolistic impulses of a united XM-Sirius.

As the Commission recognized when authorizing satellite radio in 1997, national, multi-channel satellite radio would offer services that local radio "inherently cannot provide." There is no doubt that local radio stations compete with other media for the attention of listeners. However, local radio broadcasters do not have a national footprint. Even in the largest urban markets, they cannot offer half as many channels collectively as either one of the current satellite radio licensees, let alone the two combined. Moreover, satellite radio offers a significant amount of content not permitted on broadcast media. The Commission correctly rejected a satellite radio monopoly before the spectrum auction, and it forbade one licensee from ever acquiring the other after the auction. Those restrictions remain in effect today and continue to be justified.

Undoubtedly, a satellite monopoly will cause competitive harm. A satellite radio monopoly would use its monopoly profits from subscription revenue to internally cross-subsidize new offerings and to bolster the satellite radio advance toward advertising revenue from national, regional and local sources. Cross-subsidization will open the door to predatory pricing in advertising markets. That type of unfair competition will harm local radio stations, but more importantly, it will harm the public by eroding the valuable, advertiser-supported programming and services provided by local stations.

A satellite radio monopoly will also thwart program access by other media, especially regional and national radio networks. Exclusivity is already the hallmark of satellite radio programming arrangements. With monopoly power, satellite radio will exclude other media from access to premium sports and entertainment programming. Local stations will suffer and the audiences they now serve will have no choice but to subscribe to satellite radio for certain programming.

Just as the Commission previously rejected a merger of the nation's only two direct broadcast television service providers, NAB urges you to recognize the value of continued competition in satellite radio and the adverse consequences of a satellite radio monopoly. The Commission should gather the detailed facts necessary to evaluate the impact of this proposed merger on the public interest. In particular, the Commission should make a detailed and specific request for information from the merger parties and make such information available to all interested parties.

NAB intends to submit a Petition to Deny the proposed merger at the appropriate time. Until such time, NAB looks forward to discussing these and other issues of concern to local, free over-the-air broadcasters with you and your fellow Commissioners. Please let us know what we can do to assist the FCC in its consideration of these or other matters.

Sincerely,

David K. Rehr

David K. Rehr

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Mr. Samuel Feder, General Counsel
Ms. Monica Desai, Chief, Media Bureau
Ms. Helen Domenici, Chief, International Bureau

CERTIFICATE OF SERVICE

I, Yvonne Hughes, hereby certify that I have caused copies of the foregoing letter to be served via U.S. Mail on this 22nd day of March 2007, on the following parties listed below:

Mr. Patrick L. Donnelly
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
36th Floor
New York, NY 10020

Ms. Dara Altman
XM Satellite Radio Holdings Inc.
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Washington, DC 20002

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MEMORANDUM
February 23, 2007

To: David K. Rehr
President, National Association of Broadcasters

From: David H. Solomon[1] DHS

Re: FCC-Related Concerns Raised by XM Radio/Sirius Merger

I. INTRODUCTION AND SUMMARY

Per your request, this memorandum outlines Federal Communications Commission ("FCC" or "Commission")-related concerns raised by the contemplated merger of XM Radio Inc. ("XM Radio") and Sirius Satellite Radio Inc. ("Sirius"), in which they would consolidate their satellite digital audio radio service ("satellite DARS") licenses.

Allowing XM Radio and Sirius to merge would create a satellite DARS monopoly. The combined entity would be the only company in the United States with the ability to provide a nationwide, multi-channel mobile audio programming service. Such a combination would be contrary to an explicit FCC prohibition and decades of Commission policy regarding competition. Indeed, such a government-created national media monopoly would be unique in the history of the Commission.

Consumers would likely suffer directly from the creation of a satellite DARS monopoly. With no competitors offering nationwide, mobile audio service, a satellite DARS monopolist would be able to raise consumer prices, while at the same time reducing programming choices.

In addition, XM Radio and Sirius have engaged in a pattern of significant FCC rule violations, relating to receiver interoperability, receiver interference and terrestrial repeater technical rules. These violations raise serious questions regarding whether the companies can be

[1] Partner, Wilkinson Barker Knauer, LLP; former Chief, FCC Enforcement Bureau and former FCC Deputy General Counsel.

relied on to comply in the future with FCC rules or with any condition the companies may propose or accept to achieve monopoly status.

II. BACKGROUND: APPLICABLE FCC LEGAL STANDARDS

Under section 310(d) of the Communications Act, before granting authority for the license transfers that accompany the XM Radio/Sirius merger, the Commission must determine that "the public interest, convenience, and necessity will be served thereby."[2] If it cannot do so, or if there are "substantial and material questions of fact" regarding the application, it must designate the application for an adjudicatory hearing.[3]

The Commission has described its application of the public interest, convenience and necessity standard in the merger context as follows:

> In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.[4]

The burden of proof, by a preponderance of the evidence, is on the merger applicants.[5] With respect to the threshold issue of violation of a statute or rule, the proposed merger would violate the FCC's satellite DARS anti-merger rule.[6]

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[2] 47 U.S.C. § 310(d).

[3] 47 U.S.C. §§ 308, 309(a), (d), & 310(d).

[4] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) ("*SBC/AT&T Merger Order*"). The Commission has articulated the same standard in numerous other cases. *See, e.g., id.* at nn. 60-62; *EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("*EchoStar/DirecTV Merger Order*").

[5] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18300 ¶ 16; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20574 ¶ 25.

[6] *See infra* at 4.

With respect to the Commission's public interest analysis, a key aspect is the impact of the transaction on competition. The Commission's competition analysis is broad; it is "informed by, but not limited to, traditional antitrust principles."[7] Under antitrust principles, as the Commission recognized in declining to approve the proposed EchoStar/DirecTV merger of the two national Direct Broadcast Satellite ("DBS") licensees, "courts have generally condemned mergers that result in duopoly, and have been even more hostile to those that result in monopoly."[8] Where, as here, "a merger is likely to result in a significant reduction in the number of competitors and a substantial increase in concentration, antitrust authorities generally require the parties to demonstrate that there exist countervailing, *extraordinarily large*, cognizable, and non-speculative efficiencies that are likely to result from the merger."[9]

III. CREATING A MONOPOLY WOULD UNDERMINE COMPETITION

As the Commission recognized in establishing the service, satellite DARS, as a national service, differs from local commercial radio in significant respects:

> [S]atellite DARS can provide new services that local radio inherently cannot provide. With its national reach, satellite DARS could provide continuous radio service to the long-distance motoring public, persons living in remote areas, and may offer new forms of emergency services.[10]

The Commission sought to "create as competitive a market structure as possible, while permitting each DARS provider to offer sufficient channels for a viable service."[11] While the Commission expressed concern that "spectrum constraints limit us to licensing just two satellite DARS systems at this time," it concluded that assigning licenses to two different entities was sufficient to "provide[] the opportunity for a competitive DARS service."[12]

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[7] *SBC AT&T Merger Order,* 20 FCC Rcd at 18302 ¶ 18; *see also EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20575 ¶ 27.

[8] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20604 ¶ 100.

[9] *Id.* at ¶ 102 (emphasis added).

[10] *Establishing Rules and Policies for the Digital Audio Radio Satellite Service,* 12 FCC Rcd 5754, 5760-61 ¶ 13 (1997) ("*Satellite DARS Report & Order*").

[11] *Id.* at 5786 ¶ 77.

[12] *Id.*

In deciding to have two different licensees, the Commission focused on the benefits to consumers: "Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of program voices."[13] As the Commission later explained, the decision to reject a satellite DARS monopoly (as well as to reject a cellular radio monopoly) was part of a "long-standing policy of promoting competition in the delivery of spectrum-based communications services," which it carried out specifically through "a long history of establishing spectrum-based commercial services with no fewer than two participants per service, with the aim of creating competitive markets. . . ."[14] This preference for competition over monopoly also lies at the core of the Telecommunications Act of 1996 ("1996 Act"), whose formal title is "An Act [to] promote competition and reduce regulation . . . ."[15]

It would, of course, be entirely inconsistent with the pro-competitive DARS scheme established by the Commission to permit the two licensees to combine into a monopoly enterprise. To ensure future competition, the Commission explicitly prohibited any such merger:

> Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.[16]

The Commission contemporaneously published this requirement in the Federal Register, which gave it binding legal effect as an "uncodified" substantive rule.[17]

To allow the two satellite DARS licensees to merge in order to create a satellite DARS monopoly not only would be inconsistent with the anti-merger rule and the entire competitive satellite DARS scheme designed by the Commission, but would also be inconsistent with decades of Commission precedent and congressional policy favoring competition over monopoly.

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[13] *Id.* at ¶ 78.

[14] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20598, 20662 ¶¶ 88, 277.

[15] Pub. L. No. 104, 110 Stat. 56 (1996). *See also* S. Conf. Rep. No. 230, 104th Cong. 2d Sess. 1 (1996) (the 1996 Act provides for a "pro-competitive, de-regulatory national policy framework").

[16] *Satellite DARS Report & Order*, 12 FCC Rcd at 5823 ¶ 170.

[17] 62 Fed. Reg. 11083, 11102 (March 11, 1997). *See Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977); *AT&T Corp.,* 11 FCC Rcd 3271, 3352 ¶ 151 (1995); *Nelson Broadcasting Corp.,* 6 FCC Rcd 1765 ¶¶ 3-4 (1991).

Indeed, the Commission previously refused to permit a merger of the only two nationwide DBS licensees. In doing so, the Commission found:

> We are concerned that ownership of all satellites in the full-CONUS orbital location by one entity . . . could likely undermine our goals of increased and fair competition in the provision of DBS service. We are also concerned that the claimed benefits of efficient and expeditious use of spectrum are outweighed by the potential harms associated with the concentration of ownership of key DBS spectrum licenses in a single licensee.[18]
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> * * * *
>
> [T]he record indicates that substantial potential public interest harms may result from the transaction . . . . The record before us irrefutably demonstrates that the proposed transaction would eliminate a current viable competitor from every market in the country . . . . Perhaps most significantly, each [company] holds licenses for approximately half the total orbital slots that allow broadcast to the entire continental United States – licenses they seek in this proceeding to transfer to a single new entity. . . . [C]ase law under the antitrust laws is generally quite hostile to proposed mergers that would have these impacts on the competitive structure, because such mergers are likely to increase the incentive and ability to engage in anticompetitive conduct. . . .
>
> The Applicants have cited no example where we have permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service.[19]

For precisely the same reasons, XM Radio and Sirius should not be permitted to create a nationwide satellite DARS monopoly. A merger here would be particularly problemmatic given that satellite DARS is in its early stages of development. XM Radio and Sirius both began satellite DARS service just over five years ago.

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[18] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20562 ¶ 3.

[19] *Id.* at 20661-62 ¶¶ 275-77.

IV. CONSUMERS WOULD SUFFER FROM A SATELLITE DARS MONOPOLY

Competition is not a goal in and of itself but is a means to serving consumers. As recognized by Congress in the title of the 1996 Act, competition and deregulation "secure lower prices and higher quality services for American telecommunications consumers . . . ."[20] Consistent with this, in creating a competitive market structure for satellite DARS, as noted above, the Commission explicitly focused on the benefits to consumers: "Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of program voices."[21]

Using conditions to counter the effect on rates caused by eliminating competition would not, under FCC precedent, be an appropriate solution to the consumer harm caused by creation of a satellite DARS monopoly. As the Commission said in the closely analogous context of an EchoStar/DirecTV merger pricing proposal:

> [E]ven if the national pricing plan were likely to be an effective competitive safeguard, its implementation would not be consistent with the Communications Act or with our overall policy goals. In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and particularly with *facilities-based* competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "pro-competitive, de-regulatory" policy direction. The merger would . . . totally eliminate what appears to be a very healthy level of intramodal competition among the two facilities-based DBS providers.[22]

A satellite DARS monopolist as the single entry point for nationwide mobile audio programming could also reduce program diversity. As explained by the Commission,

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[20] Pub. L. No. 104, 110 Stat. 56 (1996).

[21] *Satellite DARS Report & Order*, 12 FCC Rcd at 5786 ¶ 78.

[22] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20663 ¶ 282 (emphasis in original).

competition will further program diversity in the satellite DARS market much more effectively than a monopoly:

> We believe that licensees will have an incentive to diversify program formats and thereby provide valuable niche programming. We recognize that satellite DARS licensees are likely to provide the programming that is most profitable. Nonetheless, given that we anticipate each satellite DARS licensee will control more than 20 channels, each licensee will have an incentive to diversify programming so that one channel will not directly compete with another channel that the licensee itself controls. We have noted the importance of this incentive, particularly with respect to entertainment programming, in other proceedings.[23]

Customers could also suffer from technical incompatibility problems caused by the merger. For example, the receivers used by one company are not compatible with the other company's system, so consumers might need to purchase new receivers as a result of the merger.

V. XM RADIO AND SIRIUS HAVE ENGAGED IN RULE VIOLATIONS THAT RAISE SERIOUS QUESTIONS WHETHER THEY CAN BE RELIED ON TO COMPLY WITH FCC RULES OR CONDITIONS

As part of the public interest analysis related to a merger application, the Commission considers whether both applicants have the requisite "character" qualifications to hold Commission licenses, with particular focus on the character qualifications of the transferee.[24] With respect to FCC-related misconduct, the Commission "has stated that it would treat any violation of any provision of the Act, or of the Commission's rules, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications."[25] Both XM Radio and Sirius have engaged in significant violations of FCC rules such that serious questions arise regarding whether they can be relied on to comply in the future with FCC rules or any conditions that might be imposed as part of the merger.

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[23] *Satellite DARS Report & Order,* 12 FCC Rcd at 5762 ¶ 15.

[24] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18379 ¶ 171; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20576 ¶ 28.

[25] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18379 ¶ 172; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20576 ¶ 28.

First, both XM Radio and Sirius have violated an FCC rule that each of their satellite DARS systems "includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction."[26] While the Commission declined to mandate receiver standards, it said that, "at the very least, consumers should be able to access the services from all licensed satellite DARS systems and our rule on receiver interoperability accomplishes this."[27] The purposes of this rule included "promot[ing] competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers."[28] While both companies certified nearly 10 years ago that they would comply with this pro-competition, pro-consumer requirement, they have not done so.[29] Their systems do not currently "include" such an interoperable receiver.

Second, both XM Radio and Sirius have violated FCC equipment rules designed to ensure that their receivers do not interfere with broadcast radio stations.[30] As a result, as has been widely reported, listeners to religious and other non-commercial radio stations may not only receive interference, but may receive "signal bleed" that results in their unintentionally hearing on their car broadcast radios such programming as *The Howard Stern Show*.[31] The Commission is investigating this matter.

Third, both XM Radio and Sirius have admittedly violated FCC technical rules in connection with special temporary authority to use terrestrial repeaters. XM Radio, for example, has operated more than 221 terrestrial repeaters at unlawful power levels. It has also operated more than 142 repeaters at unauthorized locations and 19 repeaters with no authorization whatsoever. In fact, just two weeks ago, the Commission reportedly sent a letter of inquiry to

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[26] 47 C.F.R. § 25.144(a)(3)(ii).

[27] *Satellite DARS Report & Order,* 12 FCC Rcd at 5797 ¶ 106.

[28] *Id.* at 5796 ¶ 103.

[29] *See* XM Satellite Radio Holdings Inc. SEC Form 10-K at 11 (March 3, 2006) (stating that XM Radio and Sirius are "jointly developing" a common receiver platform); Sirius Satellite Radio Inc. SEC Form 10-K at 9 (March 13, 2006) (technology for a unified receiver standard "is being developed" with XM but "we have no assurances that any manufacturer will build . . . such dual-mode radios."). The companies claim in their Form 10-Ks that they have complied with the rule notwithstanding the fact that they do not offer – and have never offered – an interoperable receiver.

[30] 47 C.F.R. Part 15.

[31] *See, e.g.,* "A Mystery Heard on Radio: It's Stern's Show, No Charge," New York Times, January 26, 2007 at A17.

XM Radio concerning its terrestrial repeater network. Sirius has engaged in comparable and other technical violations in connection with its terrestrial repeaters.[32]

These violations collectively raise serious questions regarding whether the companies can be relied on in the future to comply with FCC rules or with any conditions imposed or offered as part of the merger. This is particularly the case to the extent that the violations may have been intentional. In this regard, Sirius has admitted that its unlawful receivers were the result of specific requests by its employees to manufacturers.[33]

Against this backdrop of rule violations, allowing XM Radio and Sirius to create a monopoly in violation of the FCC anti-merger rule and decades of communications policy could simply embolden them to pay even less attention to the rules of the road in pursuit of monopolistic profits.

VI. CONCLUSION: AN XM RADIO/SIRIUS MERGER WOULD BE CONTRARY TO THE PUBLIC INTEREST

Accordingly, under FCC precedent, allowing the XM Radio/Sirius merger to proceed would raise very serious legal and public interest questions. The merger would create a monopoly that would undermine competition and harm consumers. In addition, serious questions exist regarding the reliability of the companies to comply with FCC requirements in the future.

[32] *See* FCC File Nos. SAT-STA-20061002-00114 (XM Radio); SAT-STA-20061013-00122 (Sirius).

[33] Sirius Satellite Radio Inc. SEC Form 10-Q at 35 (Nov. 8, 2006) ("certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with these rules.").